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Cites for Sore Ears (A Paper Moon)

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Music, as we know, is one of our vital cultural practices. It “has charms to soothe a savage breast”¹ and is “the food of love.”² Someone who does not love music is not to be trusted³ but someone “who has music in his [*sic*] soul will be most in love with the loveliest.”⁴ Music and one’s attitude towards it tell us a lot about the ethical and moral value of a person.

Law, another key part of our culture, has traditionally dealt with music mainly as something which might fall within the domain of copyright⁵ or some related field of property.⁶ More recently, however, legal discourse in Canada has taken a much broader approach to the connections between

* Of Dalhousie Law School, Halifax and the Faculty of Law, University of Sydney, Australia respectively. We thank those students and colleagues who have helped us with this by letting us borrow from their music collections: John Barrack, Diana Belevsky, Vince Calderhead, Dave Cochran, B.T. Hill, Anna Myers, Doug Myers, Nick Richter and Mike Sobol.

1. W. Congreve, *The Mourning Bride* l.i.l.

2. W. Shakespeare, *Twelfth Night* l.i.l.

3. The man that hath no music in himself,
Nor is not moved with concord of sweet sounds,
Is fit for treasons, stratagems and spoils;
The motions of his spirit are dull as night,
And his affections dark as Erebus:
Let no such man be trusted.

W. Shakespeare, *Merchant of Venice* V.i.83.

4. Plato, *The Republic*, Book iii, sec. 402.

5. See the definition of “musical work” in s. 2 of the *Copyright Act*, R.S.C. 1985, c. C-42 and the discussion of that phrase in *Hughes on Copyright and Industrial Design* (Toronto: Butterworths, 1984), § 14.

6. For recent studies of ways in which law deals with music and other related forms of “property”, see R. Coombe, “Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue” (1991), 69 *Texas Law Rev.* 1853 and R. Pukier, “Exiled on Main Street: A Ticket Scalper’s Dilemma” (1992), 50 *U.T. Fac. L. Rev.* 280.

music and law. Increasingly, articles⁷ and books⁸ by legal scholars make direct appeals to popular music, appropriating lyrics⁹ for use in titles, as epigrams¹⁰ or in some other form of reference. As Canadian legal scholarship changes in the '90s and continues to expand its focus on the interdisciplinary and contextual aspects of law, such use of popular music references will no doubt continue and will probably occur with even greater frequency. The invocation of music in legal scholarship is an appeal to its breadth as a carrier of social meaning and to our collective understandings of the messages created by both law and music. With

7. A considerable number of articles quote song lyrics as epigrams. In addition many others have titles which make mention of songs or lyrics; of these we list only our personal top ten: B. Feldthusen, "The Gender Wars: 'Where the Boys Are'" (1990), 4 C.J.W.L. 66; W. Spicer and W. Lawrence, "Not Fade Away: The Re-emergence of Common Law Defences in Canadian Maritime Law" (1992), 71 Can. Bar Rev. 700; A. Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991), 29 Osgoode Hall L.J. 329; P. Tackaberry, "Look What They Done To My Song, Ma: The Songwriter's Moral Right of Integrity in Canada and the United States" (1989), 6 C.I.P.R. 122; B.A. Langille and P. Macklem, "Beyond Belief: Labour Law's Duty to Bargain" (1988), 13 Queen's L.J. 62; A. Petter, "Not 'Never on a Sunday': R. v. Videoflicks Ltd. et al. (1984), 49 Sask. L. Rev 96; A. Hutchinson and A. Petter, "Daydream Believing: Visionary Formalism and the Constitution" (1990), 22 Ottawa L. Rev. 365; B. Cossman, "'Dancing in the Dark': A Review of Gwen Brodsky and Shelagh Day's *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?*" (1990), 10 Windsor Yearbook of Access to Justice 223; R.W. Bauman, "Living in a Material World: Property Rights in the Charter" (1992), 3 Const. Forum 49; and A. Young, "From Elvis's Pelvis to *As Nasty as They Wanna Be*: Freedom of Expression and Contemporary Popular Music" (1991), 1 M.C.L.R. 155.

8. A. Hutchinson, *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (Toronto: Carswell, 1988), at pp. 10 and 293, and D. Greschner, "Feminist Concerns with the New Communitarians: We Don't Need Another Hero", in A. Hutchinson and L. Green, eds., *Law and Community: The End of Individualism?* (Toronto: Carswell, 1989), at p. 119.

9. Or even taking the names of rock groups as the title for books on the Supreme Court and the Charter. See D. Beatty, *Talking Heads and the Supremes* (Toronto: Carswell, 1990) appropriating the names of two groups in the one title. In addition a review of Beatty's book cleverly alludes to songs of each of those groups: R. Moon, "Stop in the Name of Sense: Comment on David Beatty's *Talking Heads and the Supremes*" (1992), 42 U.T.L.J. 228. The first of these allusions is to the number one song from March, 1965: E. Holland et al., "Stop! In the Name of Love", The Supremes (Motown, 1965). The second is to D. Byrne et al., "Girlfriend is Better", Talking Heads, *Speaking in Tongues* (Sire, 1983), which contains the refrain, "stop making sense". 'Stop Making Sense' subsequently became the name of a film and album featuring that same group: respectively *Stop Making Sense*, dir. J. Demme (Columbia Pictures, 1984) and Talking Heads, *Stop Making Sense* (Sire, 1984).

10. E.g., P. Siller, Book Review (1989), 11 Supreme Court L.R. 497.

continuing references to music, songs and lyrics in case law,¹¹ citations to these forms of expression in law reviews and books have begun to constitute another new form of legal knowledge.

But the creation of a new form of legal knowledge is not without its problems. As lawyers, we are concerned that the sources which serve to inform our arguments are readily available for verification and contestation. As legal academics, we are aware that our professional status and credibility depend to a large extent on our ability to follow the accepted forms of presenting our positions so that they too may be subjected to the scrutiny and careful evaluation of our peers and colleagues. Thus it is with some consternation that we note a major difficulty caused by the burgeoning tendency among both courts and legal academics to refer to various aspects of popular music in legal writing. We refer, of course, to the absence of a proper and accepted form of correct citation for these sources. In the absence of such a system, references to popular music are simply consigned to some sort of randomized bibliographic ghetto. If these references form part of accepted legal discourse, as we believe they do, then they must be treated with the same rigour and subjected to the same scrutiny as any other source.

Unfortunately Canadian legal scholarly practice in the citation of music has been neither rigorous nor consistent. Writers who would not be caught dead incorrectly citing a case or a journal article demonstrate a remarkable casualness or laxity when it comes to quoting and citing music. For example, in "That's Just the Way it Is: Langille on Law"¹² Allan Hutchinson offers the following quotation and attribution:

11. For example see *Grignon v. Rousell et al.* (1991), 38 C.P.R. (3d) 4 (F.C.T.D.); *MCA Canada Ltd. et al. v. Gillberry & Hawke Advertising Agency Ltd et al.* (1976), 28 C.P.R. (2d) 52 (F.C.T.D.); and *Télé-Métropole Inc. v. Bishop* (1990), 31 C.P.R. (3d) 394 (S.C.C.). Clearly not all courts are comfortable with having to deal with popular music. In *Pump, Inc. v. Collins Management, Inc.*, 746 F. Supp. 1159 (S.D.N.Y. 1990), a trademark infringement case, the opinion of Young J. notes that

"Aerosmith has developed a well-earned reputation as one of America's louder rock bands and has cultivated a devoted adolescent following since the early 1970s. Its hit songs include such classics as "Walk This Way," "Dream On," "Sweet Emotion," "My Big Ten Inch," and the poignant "Dude Look Like A Lady." (At 1161, fn. 2.)

It is our hope that by promoting citation equality for popular music we can help to fight the insecurity which prompts some lawyers and judges to resort to such tongue-in-cheek language.

12. A. Hutchinson, "That's Just the Way It Is: Langille on Law" (1989), 34 McGill L.J. 145.

*"That's just the way it is
Some things will never change
That's just the way it is
But don't you believe them"*

Bruce Hornsby¹³

Hutchinson provides his readers with no clue as to which of Hornsby's songs this quotation is from, or even on which album it might be found.¹⁴ Other authors provide incorrect dates for the songs they cite¹⁵ or misquote song titles.¹⁶ Even when information is provided the lack of useful conventions is a hindrance. For example, some authors underline/itali-

13. *Ibid.*, at 146. The footnote is ours. Hutchinson does not provide one. The quotation appears as an epigram to an article, and in such a position it might be permissible to omit a proper citation if the quotation and author are sufficiently well known. For example a well-known quotation from a Shakespeare play might, if it appeared in an epigram, carry the simple attribution "William Shakespeare", or even just "Shakespeare". Hornsby, despite his recent appearances with the Grateful Dead, has not yet achieved the status of an artist who may be referred to in such a fashion.

14. It is true that most of Hornsby's songs sound the same, but technically speaking they are different songs and, at least for purposes of citation, should be distinguished from one another.

15. Again Allan Hutchinson, as one of the more prolific quoters of music in Canadian legal literature, provides an example of this error. In "A Poetic Champion Composes: Unger (Not) on Ecology and Women" (1990), 40 U.T.L.J. 271 Hutchinson quotes part of the song "Bread and Roses" (at 295) and provides the following footnote: "J. Oppenheimer *Bread and Roses* (London: Virago, 1982)". Our focus here is not Hutchinson's misspelling of the author's name. (The lyrics to "Bread and Roses" were written by James Oppenheim.) Nor is it the fact that the lyric is not even found in the source referred to in his footnote. (The book to which the footnote refers, *Bread and Roses*, does not actually contain the song "Bread and Roses" or even that portion of the lyric that Hutchinson quotes. Shame on you, Hutch.) Our point is that the date '1982' is misleading in that it provides no clue to the lyric's birth in the American syndicalist movement 70 years earlier. Some readers will know of the song's origins in the famous Wobbly-led textile workers' strike in Lawrence, Massachusetts in 1912 and others will not, and providing a 1912 citation instead of a 1982 one will not necessarily enlighten the ignorant, but that is no excuse for obfuscating the matter.

16. David Howes is a culprit here. In his "'We Are the World' and its Counterparts: Popular Song as Constitutional Discourse" (1990), Int'l J. of Politics, Culture and Society 315 he refers (at 326) to "The Beatles' *Love Is All We Need*", and provides no citation. We can only guess that the reference he had in mind was J. Lennon and P. McCartney, "All You Need Is Love", The Beatles, *Magical Mystery Tour* (Capitol, 1967).

For other recent Beatles-related errors in Canadian legal literature see Jeffrey Miller's column in *Lawyers Weekly*, July 31, 1992, p. 3. Miller writes: "The Travelling Wilburys perform their hit, 'I Got My Mind Set On You.'" The song in question was of course performed not by the Wilburys but by ex-Beatle George Harrison. Moreover the name of the group to which Miller incorrectly attributed the song is misspelled. For a discussion of the name "Traveling Wilburys" in the context of trademark law see B. Singer, "A Rose By Any Other Name: Trademark Protection of the Names of Popular Music Groups" (1992), 14 Hastings Comm/Ent L.J. 331, at 339-40. And see further the discussion in *Traveling Wilburys, Traveling Wilburys Volume 3* (Warner, 1990), liner notes.

cize song titles,¹⁷ others place them within quotation marks, while still other do neither.¹⁸ Albums come in for similar disparity of treatment. Dates are frequently included, but not always. Sometimes the publisher, catalogue number or copyright holder are listed, sometimes not. And so on.

None of the standard Canadian sources on legal research or citation offers the scholar any guidance on the citation of musical works. There are three commonly used texts dealing with legal research in this country: Yogis and Christie's *Legal Research and Writing*,¹⁹ MacEllven's *Legal Research Handbook*,²⁰ and Banks on *Using a Law Library*.²¹ Each of these contains a section on preferred forms of citation but none of them has a thing to say about musical works. In addition to those works there are two books dedicated solely to legal citation in Canada: Tang's *Guide to Legal Citation*²² and the McGill Law Journal's *Canadian Guide to Uniform Legal Citation*.²³ Those will provide the scholar with considerable assistance on a number of esoteric points: how properly to cite the minutes of the proceedings of the Council of Europe, use of the herein-after rule as it applies to the encyclopediae of France, appropriate abbreviations of all six 19th-century series of the *Scottish Session Cases* reporters, and a host of other matters that could hardly be described as falling within the daily requirements of Canadian legal writing. Alas, despite the fact that one of them claims to take into account "the increasingly interdisciplinary nature of legal scholarship",²⁴ neither will tell you how to cite a Rolling Stones song.

Americans have things slightly better. Until recently, citation guides in that country were as silent on the music question as Canadian guides

17. For example, A. Mayrand, "Preuve Musicale d'un Plagiat Inconscient!" (1963), 23 Rev. du Bar. 353 and P. Siller, *supra*, note 10, at 497.

18. Compare W. Spicer, "'You Can't Always Get What You Want'; Canadian Maritime Law and Economic Loss", in *Meredith Memorial Lectures 1986* (Don Mills: De Boo, 1987), p. 21 with J. Bakan, "Canadian Constitutional Law and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991), 70 Can. Bar Rev. 307.

19. J.A. Yogis *et al.*, *Legal Research and Writing*, 3rd ed. by M.J. Iosopescu (Toronto: Butterworths, 1988).

20. D.T. MacEllven, *Legal Research Handbook*, 2d ed. (Toronto: Butterworths, 1986).

21. M.A. Banks, *Banks on Using a Law Library*, 5th ed. (Scarborough: Carswell, 1991).

22. C.S. Tang, *Guide to Legal Citation and Sources of Citation Aid: A Canadian Perspective*, 2d ed. (Don Mills: De Boo, 1988).

23. *Canadian Guide to Uniform Legal Citation*, 3d ed. (Toronto: Carswell, 1992).

24. *Ibid.*, at xviii.

still are, leaving scholars to contrive their own forms.²⁵ However the most recent edition of the Harvard *Bluebook*²⁶ demonstrates that citation scholars south of the border are waking up to the vital role of music in legal scholarship. Among the 100 pages of additional material in the latest *Bluebook*, following the section which informs legal scholars how properly to cite films and television shows (but, alas, not trailers or commercials), the *Bluebook* editors now offer a brief section headed 'Sound Recordings'. They articulate a format and provide examples of citations to works by David Bowie, the Beatles and—consistent with the new *Bluebook*'s effort to provide a measure of gender balance in its examples—Kate Bush.²⁷ While we commend this move, the *Bluebook*'s proposed forms are in our view inadequate.

Our proposal here is to take a modest first step to redress the lack of a guide to citation of musical works in legal literature in Canada.²⁸ We are

25. One of the more useful innovations appeared in J. Gordon, "A Dialogue About the Doctrine of Consideration" (1990), 75 Cornell L. Rev. 987. Gordon invented the "hear also" signal—a parallel to the "see also" signal used in relation to written material—when he wrote (at 993, fn. 48) "*Hear also* Yoko Ono's music."

26. *The Bluebook: A Uniform System of Citation*, 15th ed. (Cambridge, Mass.: Harvard Law Review Assoc., 1991).

27. *Ibid.*, at 124. *The Bluebook*'s principal rival, the *Maroon Book*, more properly known as *The University of Chicago Manual of Legal Citation* (Chicago: The Lawyers Co-operative Publishing Co., 1989), has yet to follow this trend, perhaps because its mentor Richard Posner is no fan of popular culture. (Posner himself confesses to this in, of all places, his "Depiction of Law in *The Bonfire of the Vanities*" (1989), 98 Yale L.J. 1653, at 1661.) For a truly catty review of the first edition of the *Maroon Book* by the editors of the Harvard Law Review see "Manual Labor, Chicago Style" (1988), 101 Harv. L. Rev. 1323. This was no doubt in response to negative comments about the *Bluebook* in R. Posner, "Goodbye to the Bluebook" (1986), 53 U. Chi. L. Rev. 1343, an essay which attended the publication of the *Maroon Book*. In the context of musical citation it is interesting to note that since that essay, Posner has had occasion to cite musical works in his writings—see R. Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, Mass: Harvard U. P., 1988) at pp. 219 and 346—and would have found no guide to citation of those works in his vaunted *Maroon Book*. The best review of the *Maroon Book* is M. Combs, "Lowering one's Cites: A (Sort of) Review of the University of Chicago Manual of Legal Citation" (1990), 76 Va. L. Rev. 1099, though Combs' work is marred by misplaced efforts to inject humour into her writing.

The editors of *The Journal of Attenuated Subtleties* were the real pathbreakers in the field of musical legal citation. See "Special Project: A System of Citation for Phonograph Records" (1982), 1 J. Atten. Subt. 40. Although the system which we will propose differs in many ways from that promulgated by *The Journal of Attenuated Subtleties*, our debt to that late, lamented journal is obvious.

28. Our focus is on scholarship published in Canada. Works by Canadian authors which are published in other countries, such as Wylie Spicer's "Ch-Ch-Changes: Stumbling Toward the Reasonable Expectations of the Assured in Marine Insurance" (1991), 66 Tulane L. Rev. 457, are beyond the scope of our discussion. Of course the Canada/U.S. border is undefended and there will be examples which appear to straddle it. See for example the citation of R. Burgdorf and M. Burgdorf, "The Wicked Witch is Almost Dead" (1977), 50 Temp. L.Q. 995 in *Eve v. Mrs. E.*, [1986] 2 S.C.R. 388 at 419.

aware that the standard forms of legal citation are not without their critics,²⁹ have been perceived as misogynist,³⁰ anal retentive,³¹ and have even given rise to litigation.³² It is not our place here to adopt a definitive position in any of these debates. We wish to assert a simple proposition that if authors of legal texts are going to treat popular music as a source of legal knowledge then it is incumbent upon them to treat that source with the same care and attention to detail as they treat all other such sources. We make a simple plea for equality.

We recognize that any attempt to classify or to systematize is a problematic exercise. Any ordering, must, in the final analysis, become an arbitrary rendering of any number of facts, acknowledged and hidden,³³ and the necessarily conservative role of convention will be a large one. Once again, however, our project is not an ambitious one with ontological or epistemological pretensions on a grand scale. Rather, we seek to instill some order, however temporary, into the chaos which currently engulfs the citation of music in legal scholarship. What follows, then, is a set of proposals for the uniform reference to and citation of musical works in Canadian legal scholarship. We advance them not as a set of prescriptive rules, but as guidelines and rebuttable presumptions, to be abandoned or modified when they would be productive of ambiguity or bad taste or would otherwise be inappropriate.

The style and typeface of textual references

As mentioned above, the stylistic practice relating to references to musical works in the text Canadian legal literature has been chaotic and confusing. For example, one common practice is to place the titles of both

29. See e.g. P. Lushing, Book Review, *A Uniform System of Citation* (1967), 67 Col. L. Rev. 600, referring to the (in)famous Harvard *Bluebook* as "the *Kama Sutra* of legal citation" (at 600); S. Tobin, Book Review (1959), 11 Stan. L. Rev. 410; W.D. Benton, Book Review (1976), 86 Yale L.J. 197; K. Gralley and J. Aisenbrey, Book Review (1977) 65 Geo. L. J. 871; J. Jacobson, Book Review (1977), 43 Brooklyn L. Rev. 826; G. Mangum, Book Review (1982), 18 Wake Forest L. Rev. 645; J. Chen, "Something Old, Something New, Something Borrowed, Something Blue" (1991), 58 U. Chi. L. Rev. 1527; L. Siroco, "Fiddling with Footnotes" (1992), 60 U. Cin. L. Rev. 1273, and; J. Gordon, "Oh No! A New Bluebook" (1992), 90 Mich. L. Rev. 1698.

30. K. Bartlett, "Feminist Legal Methods" (1990), 103 Harv. L. Rev. 829, at 829 fn.* and R. Colker "An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age and Class, [1991] Duke L.J. 324, at 324, fn.*.

31. A. Strasser, "Technical Due Process: ?" (1977), 12 Harv. C.R.-C.L. L. Rev. 507.

32. *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987).

33. See M. Foucault, *The Archaeology of Knowledge* (New York: Vintage, 1973), especially at pp. 22-25.

individual songs and of albums in quotation marks,³⁴ which fails to provide an indication of the significant difference between the two and can leave the reader confused as to whether what is being cited is an individual song or some larger collection of musical works. We suggest that songs should be differentiated from albums,³⁵ and propose a practice which parallels that which *The MLA Style Manual*³⁶ suggests for academic writing generally. Accordingly we propose that albums (whether they appear as phonograph records, cassettes, compact discs or in some other format), like books, plays, periodicals, films, radio programs, television programs, operas, musicals and ballets, should be italicized (or underlined if only Roman print is available). This reflects the album/CD's status as a 'major work', comparable to a book. Similarly, individual songs, like essays, short stories, individual episodes of radio and television programs, and chapters of books, should be enclosed in quotation marks and not italicized/underlined. See the example in the following paragraph.

When quoted in legal writing song lyrics should be treated like poetry, which is to say that quotations of three lines or fewer should be included in quotation marks in the body of the text, with a slash (/) with a space on each side to separate the lines. For example, "When I met you in the restaurant, / You could tell I was no debutante." When more than three lines of lyrics are quoted no quotation marks should be used and the quotation should be indented and set off from the body of the text with each line of the lyric beginning on a new line. The following extract from Alan Young's "From Elvis's Pelvis to *As Nasty As They Wanna Be*"³⁷ demonstrates a practice which conforms to our proposal with respect to indication of albums, songs and reproduction of lyrics:

34. E.g., *Gondos v. Hardy et al.* (1982), 38 O.R. (2d) 555 (High Ct.) and *Grignon v. Roussel*, *supra*, note 11. In R.G. Benson, "Legal Protection for Musical Works: A Modern Perspective" (1989), 22 C.P.R. (3d) 97 we find a similar problem, with individual songs indicated by quotation marks and the Broadway musical *West Side Story* being accorded similar treatment.

35. Here we use the term 'album' generically. Current recording technology and marketing arrangements provide the consumer with three formats: the traditional vinyl phonograph record, the compact disc and the cassette. Future technological developments (DAT, etc.) will no doubt add to the choices. For the purposes of proper citation, however, we believe that these distinctions are largely irrelevant and may be compared with hard and soft cover versions of books, or overseas editions of the same work. See also the discussion at note 41 and accompanying text below.

36. The Modern Language Association of America (New York, 1985).

37. *Supra*, note 7, at 160 (footnote omitted).

On this record, Prince's *Purple Rain*, there was a song, "Darling Nikki", which contained the following lyrics:

I knew a girl named Nikki
 I guess you could say she was a sex fiend
 I met her in a hotel lobby
 Masturbating with a magazine
 She said, "How'd you like to waste some time"
 And I could not resist
 When I saw little Nikki grind.

We guess you had to be there.

Citation/Footnotes

It is sometimes assumed that the underlying principles of legal citation may be stated unproblematically. The main goal is said to be to enable the reader to locate the original source efficiently and accurately.³⁸ The rest seems simply a matter of choosing conventions which will promote that end in a simple, unambiguous and consistent fashion. A moment's reflection reveals that matters are more complicated. There is an obvious tension between completeness and brevity. This is most clearly seen in the question of parallel citations. If, for example, a case is reported in more than one series of law report should all reports be cited? A positive answer can make for cluttered footnotes; a negative one will hinder some readers—those who have access only to the case reports which are omitted. The problem is considerably more acute for songs than for cases. Cases are seldom reported in more than three or four series of reports, so the question of whether to provide a reference to all available sources or only to some subset of them, while important, will not be crucial. However songs may appear in a large number of versions. For example, the

38. The editors of *The Bluebook* claim that this is the "basic purpose of legal citation". (*Supra*, note 26, at 4.). MacEllven writes: "Legal citation form has one main objective—to provide the researcher with sufficient information to locate references easily." *Supra*, note 20, at p. 311. Perhaps the strongest expression of this point of view is found in M. Price, *A Practical Manual of Standard Legal Citations*, 2nd ed. (Dobbs Ferry, N.Y.: Oceana, 1958), who writes (at p. iii): "A legal citation has only one purpose: to lead its reader to the work cited...." As we will make clear, we disagree.

Beatles' "Yesterday"³⁹ has been recorded over 2500 times. A citation format which mandated references to all recorded versions would be a mindless exercise in diminishing returns which would impose great difficulties on a scholar who wanted to cite "Yesterday", and for these reasons we recommend that such a requirement be imposed only in first-year law school writing exercises.

In addition to the inescapable tension between brevity and completeness there are other complications. Not all readers wish to look up the original source. Indeed most readers who glance at citations do not. They may simply wish further information—e.g., to find out the year a quoted piece of scholarship was written, to ascertain which level of court decided a given case, or simply to direct their attention away from the text and toward the footnotes, which are the most important part of most good legal writing.⁴⁰ Any citation form will thus be a compromise between a variety of needs and considerations, and none will be perfectly suited to all readers. Our proposal will endeavour to take this into account.

(a) *Records, tapes and compact discs*

Recording technology and marketing strategies are in a state of flux. Emerging technological advances such as Digital Audio Tapes (DATs) and Digital Compact Cassettes (DCCs) are apparently set to revolutionize the music industry and to change irrevocably our habits as consumers. There is, of course, nothing new here. Just as Edison's phonograph

39. J. Lennon and P. McCartney, "Yesterday", The Beatles, *Yesterday and Today* (Capitol, 1965). One need not even enter into the absurdity of a footnote with 2500 references to encounter practical difficulties here. The dynamics of authorship and the internationalization of both the recording industry and legal scholarship pose problems in our quest for better citation practice. Thus, like most Beatle tunes, "Yesterday" is listed as jointly composed by Lennon and McCartney yet "we" all know that this is a "Paul song". Is legal citation to be driven by copyright law and practice or by more democratically derived systems of knowledge based on our position in an interpretive community? (See S. Fish, *Is There a Text in this Class?* (Cambridge Mass.: Harvard U.P., 1980).) Assuming we can sort out this aspect of the "Who is your favourite Beatle?" dilemma, we are then faced with the fact that "Yesterday" appeared on *Yesterday and Today* in North America but on *Help* (Capitol, 1965) in the U.K. A *Help* L.P. (Capitol, 1965) did appear in North America, but did not contain "Yesterday". Citation here raises questions of particular import and sensitivity for Canadian legal scholars and epitomizes our awkward position between Britain and the U.S. Is an anglophilic preference to be given in citation? Is this strengthened by the Beatles' Liverpoolian origins, a kind of *lex loci scripti*? Should we, on the other hand, recognize both the reality of our closeness to the U.S. and the practical reality that the "American" version was distributed in Canada and is more likely to be available here? Does the correct form of reference for "Yesterday" become a trope for the 1992 referendum within the politics of legal citation? Can we decide such important questions if we cannot even come to grips with such a minor issue like the Constitution? All our troubles seemed so far away ...

40. On this point see J. Balkin, "The Footnote" (1989), 83 Nw. U. L. Rev. 275.

changed the way we learn about and perceive music,⁴¹ so too the old 78 was replaced by the 45, which was replaced by the 33 1/3 LP, which in turn has been successfully challenged by cassettes and compact discs (CDs). Monaural sound has been replaced by stereo, which survived the quadraphonic fad to be enhanced by digital technology. While these technological changes are significant they do not, except in a limited range (see below), have any impact on legal citation. They are, in effect, no different from the hardbound book losing ground to the paperback. What is important is that a sensible and consistent form of citation be used.

In our view the data which should be included in the citation of a sound recording—be it phonograph record, CD, cassette or cartridge—include the lead artist(s), the title of the collection, the publisher and the date of original issue. The following citation from Alan Young's article⁴² fits our proposed form:

Prince, *Purple Rain* (Warner Records, 1983).⁴³

The fact that *Purple Rain* is available in CD, cassette and phonograph, or that in the case of a phonograph record the playing speed was 33 1/3 r.p.m., seems irrelevant from the point of view of legal citation, and we propose that it need not be included. Similarly the fact that the *Purple Rain* was a stereophonic—as opposed to monaural or quadraphonic—recording, while possibly of interest to a library cataloguer,⁴⁴ seems a detail which would normally be irrelevant to legal citation, and we recommend that such material be omitted.

It seems appropriate that where more than one artist appears on an album the citation should parallel the treatment of joint authors of books. That is, the 'et al.' sign should be used when there are more than three⁴⁵ artists. For example:

Bob Dylan and the Grateful Dead, *Dylan & the Dead* (Columbia, 1989)

George Harrison et al., *The Concert for Bangladesh* (Apple, 1971)

41. For a study of the nature of recorded music, see Eisenberg, *The Recording Angel: Music, Records and Culture from Aristotle to Zappa* (New York: McGraw Hill, 1987).

42. *Supra*, note 7.

43. *Ibid.*, at 160.

44. See P. Winkler and M. Gorman, *Anglo-American Cataloguing Rules* (London: The Library Association, 1978), at pp. 144 ff.

45. Carswell's *Canadian Guide to Uniform Legal Citation* recommends the use of 'et al.' when there are more than three joint authors (*supra*, note 22, at 48), while Tang would have writers resort to it when there are more than two (*supra*, note 21, at 32).

However when the artists' names have become recognized as 'a group' it is proper to cite them all. For example:

Crosby, Stills, Nash and Young ...

not

Crosby *et al.*

This reflects the 'group's' status as a corporate author, not unlike Halsburys or a law reform commission. Scholars will have to be aware, however, that groups have been known to split up, with more than one faction laying claim to use of the name. See, for example, the extended litigation over use of the name The Platters.⁴⁶ This might necessitate elaborations of our proposed citational form—for instance an attribution to "the real Platters".

As with the citation of other legal material, the use of 'hereinafter' followed by an abbreviated reference is recommended, particularly when the title is a long one. For example:

D. Bowie, *The Rise and Fall of Ziggy Stardust and the Spiders from Mars* (RCA Records, 1972). (Hereinafter, *Ziggy*.)"

(b) *Songs*

Two principal problems arise with the citation of songs in legal literature. The first of these is whether it is desirable for the citation to include a reference to any album or collection in which that song might originally have appeared. For example, when Paul Tackaberry (mis)quotes a Melanie song in his article "Look What They Done to My Song, Ma"⁴⁷ and his footnote offers only the year and title of the song, is that sufficient? In our view it is not. If a key goal of legal citation is to permit readers to trace a quotation or other reference to its original source then readers will be hindered by a citation which fails to direct them to most commonly available source of publication of a song. As a general rule then, we propose that citations for songs which originally appear on an album contain a reference to that album, so Tackaberry's citation should have read:

46. *Robi v. Five Platters, Inc.*, 918 F. 2d 1439 (9th Cir. 1990); *Robi v. Five Platters, Inc.*, 838 F. 2d 318 (9th Cir. 1988); *Five Platters, Inc. v. Cook*, 491 F. Supp. 1165 (W.D. Pa. 1980). This is by no means a complete list of Platters-related litigation. For a fuller account and some useful analysis see Singer, *supra*, note 16, at 335 and 379-80.

47. *Supra*, note 7, at 122. The misquotation is yet another example of the second-rate treatment which popular music receives at the hands of legal scholars. Tackaberry drops the word 'Ma' from the second line of his five-line quotation, giving rise to disturbing questions regarding the effacement of the female.

Melanie Safka, "What Have They Done to my Song, Ma",
Candles in the Rain (Buddah, 1970).

An alternative citation to a greatest hits album or other compilation may also be included, but should not supplant the citation to the original album. We perceive the original album as being the musical equivalent of an official law report, and consequently it should appear first in any string citation. Thus the following would be appropriate:

Melanie Safka, "What Have They Done to my Song, Ma",
Candles in the Rain (Buddah, 1970); *The Best of Melanie*
(Rhino, 1990).

Some legal scholars, Richard Devlin for example, have preferred to cite song lyrics to a print source such as a book,⁴⁸ and that seems an acceptable alternative. For example:

Robert Hunter, "Friend of the Devil", in *A Box of Rain* (New
York: Viking/Penguin, 1990), p. 86.

When the citation of a song includes a reference to an album it should not normally be necessary to indicate whether the album is a phonograph record, a CD or a cassette, since in most cases albums issued in more than one of those formats contain the same material. Sometimes, however, cassettes and CDs contain songs which are not included on the phonograph version of an album due its more constrained physical limitations. When that is the case the citation should make note of that, as follows:

Margo and Michael Timmins, "Blue Moon Revisited", Cow-
boy Junkies, *The Trinity Session* (RCA, 1988), cassette and
CD only.

In many cases the composer and the performer will be different persons, and we suggest that both names be included, as follows:

Chris Smither, "I Feel the Same", Bonnie Raitt, *Takin My
Time* (Warner Bros., 1973).

It is true that Smither's song was copyrighted and sung in public (by Smither) before its appearance on Raitt's *Takin My Time*, but for all practical purposes that album represents the easiest place for readers to track down the song.

In most cases references of this sort should be to the song's first appearance on a commercially available sound recording, for such a citation will convey pertinent information as to the song's date. The problems which can arise from failure to adhere to such a practice can be

48. See R. Devlin, "Nomos and Thanatos (Part A). The Killing Fields: Modern Law and Legal Theory" (1989), 12 Dal. L.J. 298, at 305-6.

seen in the following example. Loreenne Clark in "Politics and Law: The Theory and Practice of Male Supremacy; or, It Wasn't God Who Made Honky Tonk Angels"⁴⁹ misquotes⁵⁰ the lyrics to the country classic mentioned in her title and provides the following footnote:

J.D. Miller, "It Wasn't God Who Made Honky Tonk Angels,"
as sung by Ellen McIlwaine, *Honky Tonk Angel*, Polydor
Records, 1972.⁵¹

This citation provides much useful information but raises the question whether there is something special about McIlwaine's rendering of this song to which Clark intends to direct us. The song in question is twenty years older than 1972 and was recorded by many people before Ellen McIlwaine, so why the citation to that album? Perhaps Clark had a special reason for ignoring Kitty Wells' 1952 breakthrough hit and directing her readers to this 1972 version of the song (e.g., perhaps McIlwaine sings in a different voice), but in the absence of an accepted scheme for citation of songs the reader cannot be sure. Consequently in the circumstance where the focus is on the song—i.e., where there is no particular reason for singling out a particular artist's rendition—we prefer a citation to the first appearance. For example,

J.D. Miller, "It Wasn't God Who Made Honky Tonk Angels",
Kitty Wells (Decca, 1952).

49. In *Law and Policy*, ed. D. N. Weisstub (Downsview: Osgoode Hall Law School, 1976), p. 35. For an updating of some of the themes in Clark's essay see R. Sollinger, *Wake Up Little Susie: Single Pregnancy and Race Before Roe v. Wade* (New York: Routledge, 1992).

50. While our focus at this stage is not the accuracy of quotations, it is pertinent to note that Clark's careless reproduction of this lyric, while unrepresentative of her scholarship as a whole, is all too characteristic of the sloppy handling of popular culture in legal scholarship generally. Clark's quotation reads as follows:

It's a shame that all the blame is on us women; it's not true that only you men feel the same. *It wasn't God who made honky tonk angels*, 'cause from the start, 'most every heart that's ever broken always was because there was a man to blame *Ibid.*, at 52, emphasis added.)

An audition of the McIlwaine album (see the text at note 51, *infra*) reveals that the italicized words do not appear in the verse which Clark quotes. They are lifted from the song's chorus and transplanted by her into the middle of this verse. This is a shoddy way to treat the top selling country and western song of 1952. More importantly, this gerrymandered quotation conveys a claim about deity's role in the construction of negative female stereotypes which the original lyric may not support. Moreover it represents that lyric as containing a most inappropriate rhyme scheme, though this is obscured by Clark's failure to follow accepted techniques for reproducing lyrics by starting each line of the verse on a new line.

In a final twist, a recent article by Clark significantly misquotes her own article which misquoted "It Wasn't God Who Made Honky Tonk Angels". This is our misquotation of the week. The fourth caller to locate the misquotation and report it to (902) 494-1011 will win a free copy of Lou Reed's *New Sensations* (RCA, 1984).

51. *Ibid.*, at 54.

However references to later versions of a song should by no means be proscribed. Just as legal scholars want to inform their readers about subsequent judicial treatment of a case they are discussing—i.e., whether it was appealed, reversed, *etc.*—writers referring to songs may wish to inform their readers about the existence of significant cover versions. We propose the adoption of the abbreviated ‘cov’d’. Thus the following would be acceptable:

J.D. Miller, “It Wasn’t God Who Made Honky Tonk Angels”,
Kitty Wells (Decca, 1952), cov’d Ellen McIlwaine, *Honky
Tonk Angel* (Polydor Records, 1972).

or

J.D. Miller, “It Wasn’t God Who Made Honky Tonk Angels”
(1952), cov’d Ellen McIlwaine, *Honky Tonk Angel* (Polydor
Records, 1972).

Of course current practice in the citation of decisional law employs a variety of abbreviations to indicate the precise nature of later judicial treatment of a case: foll’d, rev’d, appl’d, dist’d, *etc.* It might turn out that our simple ‘cov’d’ is insufficient to convey the complexity of subsequent artistic treatments of an individual song and that a greater variety of indicators is needed. For example it might be the case that an abbreviation such as ‘man’d’ (short for ‘mangled’) would be a more precise description of cover versions by Johnny Mathis or Pat Boone. We leave developments along such lines to future scholars.

The question arises whether a pinpoint reference to a song’s position on a record, cassette or CD should also be included. That is, should Siller’s citation to “Like a Rolling Stone”⁵² read as follows:

“Bob Dylan, “Like a Rolling Stone”, *Highway 61 Revisited*
(Columbia Records, 1965), side 1, track 1.”?

Although including a pinpoint reference would make for a parallelism between the citation of songs and the citation of chapters or articles in books (where adherence to standard form requires that a page reference be given), our view is that it should not normally be necessary to include the side and track location. The location information would have to be different for phonograph records, cassettes and CDs,⁵³ so giving a pinpoint reference for each of those formats would result in a cluttered

52. *Supra*, note 10.

53. Indeed one of the much-touted advantages of the CD format is the programming function found on many CD players. This function allows the “listener” to determine (or alternatively randomize) the order of play of the selections on the disc. While the songs technically remain encoded in a particular order, the use of this innovation serves to deconstruct the very notion that songs “appear” in a particular pre-ordained and canonical order.

footnote. Moreover, once a reader has located the record, cassette or album, the task of locating an individual song will rarely be difficult.

Of course when a song appears more than once on the same album and the writer's intent is to refer to one particular version a pinpoint reference will be necessary. For example:

Bob Dylan, "Forever Young", *Planet Waves* (Asylum Records, 1974), side 1, track 6.

Conclusion

We live in what it is now trendy to describe as the postmodern era, a time when "the status of knowledge is altered".⁵⁴ One of the consequences of postmodernity for legal scholarship is what we have identified as the expansion of the field of legal knowledge to include various elements of popular culture and more particularly music.

We have not attempted to offer here a comprehensive proposal for mapping⁵⁵ all of the possible ramifications of the new legal knowledge or knowledges. Such a project would be not only problematic within the postmodern paradigm (itself an oxymoronic construction) but is clearly beyond our modest intentions. Instead, we have offered what is merely a proposal for dealing in a pragmatic fashion with a minor subset of the broader category of issues.

From within that minor subset, the proper citation of references to popular music in legal scholarship, we have eschewed any attempt at totalization. We do not pretend to possess either the capacity or the energy to discuss and analyse all of the questions which legal scholars in Canada must now address. Our own effort here is glaringly incomplete even on its own terms. For example, while we make the case for the album (in all its manifestations) as a major work⁵⁶ and the song as occupying a position lower in the hierarchy we do not address the popular format of the EP (the extended play single, longer than the "original" song, shorter than an album) which might fit into either category or may need to be treated *sui generis*. At the same time, we do not deal with such tricky legal and epistemological issues as the proper system for the citation of bootleg recordings. Are they to be treated as major published works or does their quasi-legality call for some special treatment analogous to that of an unpublished manuscript? Nor, finally, have we dealt with the contentious

54. Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (Minneapolis: U. Minn. Press, 1984), at p. 3.

55. See Andreas Huyssen, "Mapping the Postmodern" (1984), 33 *New German Critique* 5.

56. See *supra*, note 35 and accompanying text.

issue of digital sampling⁵⁷ as it occurs in the now nearly mainstream genre of rap. The practice of many hip-hop or rap artists of sampling bits of other pieces of music and incorporating them into a “new” or original composition raises many issues which are too complex to be entertained in our preliminary effort. Perhaps one could propose the signal “sample” to indicate references to lyrics from one song incorporated into a new one, thereby analogizing this practice to the more obvious “cover” version phenomenon. Whether the “mangled” signal is required would be within the aesthetic discretion of the author, except in the case of Johnny Mathis or Pat Boone where it would remain obligatory. But each of these issues, and many more, must necessarily lie beyond the scope of our modest enterprise. We have proposed a simple taxonomy for the citation of popular music in legal scholarship, a taxonomy which is not epistemological but is rather pragmatic in origin. We leave the questions of the EP, the bootleg, sampling and many more to others, along with the simple plea which has informed our effort from the beginning: give popular culture its due — treat it as you would a decision of the Supreme Court.

57. See J. Marcus, “Don’t Stop that Funky Beat: the Essentiality of Digital Sampling to Rap Music” (1991), 13 *Hastings Communication and Entertainment Law Journal* 767; D.P. Tackaberry, “The Digital Sound Sampler: Weapon of the Technological Pirate or Palette of the Modern Artist?” (1990), 1 *Entertainment L. Rev.* 87; and D. Sanjek, “‘Don’t Have to DJ No More’: Sampling and the ‘Autonomous’ Creator” (1992), 10 *Cardozo Arts & Entertainment L.J.* 607. Of course legal scholars have been doing the verbal equivalent of sampling since at least the time of the introduction of the word processor.